No. 02-815

Supreme Court, U.S.
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In The

Supreme Court of the United States

CITY OF SACRAMENTO and MIKE KASHIWAGI, Director of the Department of Public Works of the City of Sacramento, in His Official Capacity,

Petitioners,

v.

JOAN BARDEN, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

1. Whether the program access requirement of Title II of the Americans with Disabilities Act, 42 U.S.C. §12132, and the Rehabilitation Act of 1973, 29 U.S.C. §794, applies to public sidewalks.

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INTRODUCTION

This case asks the simple question of whether a city which owns, maintains and controls public sidewalks has any obligation under the program access requirements of the Americans with Disabilities Act ("ADA") and Section 504 of the Rehabilitation Act of 1973 ("Rehab Act") to take reasonable steps over time to remove barriers that limit access on such sidewalks for people with mobility and/or vision disabilities. Under the plain language of the statutes and regulations, as well as existing precedent from this Court and various circuit courts, the Ninth Circuit properly found that the answer is yes. This decision creates no split within the circuits, nor does it represent a break with existing precedent or a deviation from the general rules of statutory construction. This Court's review is not warranted.

STATEMENT OF THE CASE

I. STATUTORY AND REGULATORY STRUCTURE

Title II of the ADA requires public entities, including local governments, to ensure that "[n]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. §12132; *see also* 28 C.F.R. §35.130(a) (same).[1]

[1] The statutes and implementing regulations at issue in this case are set forth in the Petition for a Writ of Certiorari Appendix E ("Pet.App.") at 21a-31a.

The Rehab Act contains a similar mandate, stating that "[n]o otherwise qualified individual with a disability in the United States, as defined in section 705(20) of this title, shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance. . . . " 29 U.S.C. §794; *see also* 28 C.F.R. §41.56 (same).

Congress has directed that Title II of the ADA be interpreted in a manner consistent with the Rehab Act. *See* 42 U.S.C. §12134(b) & 12201(a); *see also Bay Area Addiction and Treatment, Inc. v. City of Antioch ("BAART")*, 179 F.3d 725, 731 (9th Cir. 1999). The ADA does not define "services, programs or activities." However, the Rehab Act defines "program or activity" as "all of the operations of a department, agency, special purpose district, or other instrumentality of a State or of a local government." 29 U.S.C. §794(b)(1)(A).

To implement the ADA, Congress directed the Attorney General to promulgate regulations setting standards applicable to all facilities controlled by public entities. 42 U.S.C. §12134(c).[2] The preamble to these regulations explains that "Title II applies to anything a public entity does. . . . All governmental activities of public entities are covered." 28 C.F.R. pt. 35, app. A at 456. As further explained by the Department of Justice:

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[2] As the City notes, these regulations create a distinction between new facilities, which are subject to the new construction requirements, and existing facilities, which are subject to the program access requirements at issue here. *See* 28 C.F.R. §35.150 (existing facilities); and 28 C.F.R. §35.151 (new construction and alterations).

> there are two major categories of programs or activities covered by this regulation: those involving general public contact as part of ongoing operations of the entity and those directly administered by the entities for program beneficiaries and participants. Activities in the first category include communication with the public . . . *and the public's use of the entity's facilities.*

Id. (emphasis added). The implementing regulations define "facilities" to include "all or any portion of . . . roads, walks, [or] passageways" controlled by a public entity. 28 C.F.R. §35.104.

The regulations applicable to "existing facilities" also explain the scope of the program access requirement, stating that "[a] public entity shall operate each service, program, or activity so that the service, program, or activity, when viewed in its entirety, is readily accessible to and usable by individuals with disabilities." 28 C.F.R. §35.150(a). However, the regulations clearly state that this standard does not "[n]ecessarily require a public entity to make each of its existing facilities accessible to and usable by individuals with disabilities." 28 C.F.R. §35.150(a)(1); *see also* 28 C.F.R. §41.57(a) (same for Rehab Act). A public entity is also not obligated "to take any action that it can demonstrate would result in . . . undue financial and administrative burdens." 28 C.F.R. §35.150(a)(3).

To guide public entities in implementing the program access standard, the Department of Justice set forth specific procedures for public entities to follow in identifying and removing barriers. The regulations detail the methods for providing program access to existing facilities, including the requirements for conducting a self-evaluation and developing a transition plan where necessary. *See* 28 C.F.R.

§35.150. This regulation also contains a specific requirement which states that "[i]f a public entity has responsibility or authority over streets, roads, or walkways, its transition plan shall include a schedule for providing curb ramps or other sloped areas where pedestrian walks cross curbs. . . . " 28 C.F.R. §35.150(d)(2).

II. NATURE OF THE BARRIERS AT ISSUE

It is not disputed that the public sidewalks within the City of Sacramento contain barriers that make the sidewalks either dangerous or completely inaccessible for people with mobility and vision disabilities. It is also not disputed that many of the sidewalk barriers at issue involve simple-to-fix problems such as benches or sign posts that block wheelchair access by narrowing the sidewalk, broken-up concrete that creates a tripping hazard for people with vision disabilities and an obstacle for people with mobility disabilities, and protruding objects that require a warning feature so that blind pedestrians can detect them with their canes. Other barriers require greater effort to remedy, such as utility poles that narrow the sidewalk and excessive cross slope conditions that make the sidewalk dangerous if not impossible to use for people with mobility disabilities.

Taken together, these types of barriers frequently make travel along the sidewalk for a person with a disability difficult and, at times, dangerous. For example, such barriers routinely force wheelchair users to travel in the street and fight for space alongside cars and trucks. The cumulative effect of sidewalk barriers is the profound limitation of the ability of people with disabilities to travel

around in the community and to conduct the basic activities of daily life.

III. HISTORY OF THE CASE AND OPINIONS BELOW

Respondents are a class of individuals with mobility and/or vision disabilities who use the sidewalks in the City of Sacramento.[3] Respondents brought this action on March 15, 1999 against the City of Sacramento, and Mike Kashiwagi, Director of the Department of Public Works of the City of Sacramento, in his Official Capacity, alleging, among other things, violations of the ADA and Rehab Act.

Respondents assert two distinct types of claims in this action concerning access to sidewalks and curb ramps in the City of Sacramento. The first type of claim involves access standards that are triggered when facilities are newly constructed or altered. These claims are not at issue here. The second type of claim involves the City's overall obligation to provide program access to its existing programs, services and activities as required by the ADA and the Rehab Act.

In addition, each of these claims is comprised of two issues: curb cuts and sidewalk barriers. Curb cuts, which are also known as curb ramps, allow people who use mobility aids to get onto and off of the sidewalk, usually at the corners. Sidewalk barriers are those barriers

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[3] The class is defined as: "all persons with mobility and/or vision disabilities who seek full and equal access pertaining to curb cuts and sidewalks in the City of Sacramento's public rights of way."

explained above that impede travel between the curb cuts for people with mobility and vision disabilities.

The parties entered into a stipulated injunction, approved by the district court in February of 2001, that resolved all issues related to curb cuts. As part of this injunction, the City agreed to install 1500 curb ramps per year pursuant to a Transition Plan developed by the City. Pet.App. C at 11a-18a.

The parties could not reach agreement, however, on the issue of whether sidewalks are a program, service or activity of the City and thus subject to program access requirements. This issue was presented in the parties' cross-motions for summary judgment and summary adjudication heard by the district court on February 16, 2001. The Court determined that sidewalks "are not a program, service or activity of the City of Sacramento, and thus not subject to the program access requirements of the ADA and Rehab Act." Pet.App. B at 9a-10a. The district court certified the decision for interlocutory review.

On June 12, 2002, the Ninth Circuit reversed, holding that "public sidewalks in the City of Sacramento are a service, program, or activity of the City within the meaning of Title II of the Americans with Disabilities Act, 42 U.S.C. §12132 [and] §504 of the Rehabilitation Act, 29 U.S.C. §794." Pet.App. A at 2a. The Ninth Circuit held that "we have construed 'the ADA's broad language [as] bring[ing] within its scope "anything a public entity does."'" *Id.* at 5a (citing *Yeskey v. Pa. Dep't of Corr.*, 118 F.3d 168, 171 (3d Cir. 1997), *aff'd*, 524 U.S. 206 (1998); *Johnson v. City of Saline*, 151 F.3d 564, 569 (6th Cir. 1998); and *Innovative Health Sys. v. City of White Plains,* 117 F.3d 37, 45 (2d Cir. 1997)). This language is derived directly from

the preamble to the ADA's implementing regulations. *See* 28 C.F.R. pt. 35, app. A at 456. The court further found that this "construction of the phrase, 'services, programs, or activities,' is supported by the plain language of the Rehabilitation Act because, although the ADA does not define 'services, programs, or activities,' the Rehabilitation Act defines 'program or activity' as 'all of the operations of a qualifying local government.'" Pet.App. A at 6a. (citing 29 U.S.C. §794(b)(1)(A)).

The Ninth Circuit determined that the language and intent of the ADA, as well as its legislative history, supported this interpretation. As the court noted, the "ADA must be construed broadly in order to effectively implement the ADA's fundamental purpose of provid[ing] a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." Pet.App. A at 7a (quoting *Hason v. Medical Bd. of Cal.*, 279 F.3d 1167, 1172 (9th Cir. 2002), *cert. granted*, 123 S.Ct. 561 (Mem) (Nov. 18, 2002) (No. 02-479)[4] (quoting *Arnold v. United Parcel Service, Inc.*, 136 F.3d 854, 861 (1st Cir. 1998))) (internal quotation marks omitted).

The Ninth Circuit further informed its decision by reference to the requirement contained in the implementing regulations that public entities provide curb cuts along public sidewalks. *See* 28 C.F.R. §35.150(d)(2). Relying upon this, the Ninth Circuit concluded that "curb ramps, however, could not be covered unless the sidewalks themselves

[4] The *Hason* decision was accepted for review by this Court on other grounds (Eleventh Amendment immunity).

are covered." Pet.App. A at 8a. This conclusion was advocated by the U.S. Department of Justice as *amicus* before the court. Relying on *Auer v. Robbins*, 519 U.S. 452, 461 (1997), the Ninth Circuit deferred to the Department of Justice's interpretation of its own regulation. *Id.* With this guidance, the court remanded the case for further proceedings. Pet.App. A at 8a.

The City's petition for rehearing and rehearing *en banc* at the Ninth Circuit was denied on September 5, 2002. Pet.App. D at 19a-20a.

Because this case was presented on interlocutory appeal, no trial has been held, and no evidence has been taken regarding what the City of Sacramento is required to do in order to provide program access to the system of public sidewalks. As a result, there is no evidence in the record regarding the exact extent of the barriers, or the cost of removing any such barriers. Such issues will be addressed by the district court on remand.

REASONS THE PETITION SHOULD BE DENIED

Far from conflicting with this Court's jurisprudence, the Ninth Circuit's decision in this case reaffirms the comprehensive mandate of the ADA as it has long been recognized by this Court. In addition, because the Ninth Circuit was the first court to consider the issue of whether public sidewalks are subject to the program access requirements of the ADA and Rehab Act, there is no conflict among the courts on this issue. On the broader issue of the scope of Title II of the ADA, the Ninth Circuit's decision comports with other court decisions.

Moreover, the City's petition misstates the impact of the Ninth Circuit's opinion. In order to provide program access the City must only remove barriers to the extent it can do so without creating an undue financial or administrative burden. Neither the district court nor the Ninth Circuit has addressed this issue, so it is not appropriate for review.

For these reasons, and as more fully discussed below, the petition for a writ of certiorari should be denied.

I. THERE IS NO CONFLICT IN THE COURTS ON ANY ISSUE RAISED BY THIS CASE

The City argues that the Ninth Circuit's decision in this case is in conflict with other circuits. In order to do so, the City identifies three discrete issues in the hope that it will create the appearance of a circuit split. To the extent there is any legitimate disagreement among the circuits on the issues raised by the City, those issues are not appropriate for review in this case.

For example, the City raises the issue of arrests, and cites to, *inter alia*, the Fourth Circuit's decision in *Rosen v. Montgomery County*, 121 F.3d 154 (4th Cir. 1997) (holding that Title II does not apply to arrests). However, the *Rosen* court's analysis rested on what it found to be an implied requirement of voluntariness under the ADA. *Id.* at 157. This reasoning was rejected by this Court in *Pennsylvania Dep't of Corrections v. Yeskey*, 524 U.S. 206 (1998). *See Thompson v. Davis*, 282 F.3d 780, 785 (9th Cir. 2002) (noting that the *Rosen* reasoning "has now been discredited by the Supreme Court"); *Calloway v. Boro of Glassboro Department of Police*, 89 F.Supp.2d 543, 556 (D.N.J. 2000) (noting that *Rosen* relied upon the "now discredited

reasoning that the statutory text implies voluntariness on the part of the individual"); *see also Gorman v. Bartch*, 152 F.3d 907, 912 (8th Cir. 1998) (finding that transportation of arrestee to station house is covered by Title II, and noting that pursuant to *Yeskey* covered programs and services do not need to be voluntary); *but see Hainze v. Richards*, 207 F.3d 795 (5th Cir. 2000) (holding that ADA does not apply to on-the-street response of officers involved with shooting of a suspect with mental illness).

Similarly, the City raises the issue of termination of parental rights. Respondents do not contest that the courts have struggled with the application of the ADA in the context of termination of parental rights proceedings. *See In re Doe,* 2002 WL 31341332 (Hawai'i App. Oct. 18, 2002) (holding that a termination of parental rights proceeding ("TPR") is covered by Title II, but that the ADA does not allow parents to defend a TPR proceeding on the basis that they were not provided with appropriate services to accommodate their disabilities); and *In re Antony B.*, 54 Conn.App. 463 (1999) (holding that ADA is not a defense in TPR proceedings). However, TPR cases raise unique issues concerning the intended beneficiaries of the public entity's activity – issues that simply do not apply to public sidewalks. There is no question here that the City's public sidewalks exist to benefit the general public by enabling pedestrians to safely navigate throughout the city.

Lastly, Respondents also do not contest that courts have split on the issue of whether employment claims against public entities are appropriately brought pursuant to Title I or Title II of the ADA. However, with that issue, the question is not whether public employment is covered at all, but rather which provision of the ADA appropriately

governs this area.[5] *Compare Zimmerman v. Oregon Dept. of Justice*, 170 F.3d 1169 (9th Cir. 1999) (public employment covered by Title I), *with Bledsoe v. Palm Beach Cty. Soil & Water Conservation Dist.*, 133 F.3d 816 (11th Cir. 1998) (public employment covered by Title II). Determining whether Congress intended public employment to be addressed solely by Title I of the ADA involves a focus on the overall structure of the statute and Congress's intent in setting up extensive procedural requirements for employment discrimination claims – issues that simply do not arise in addressing sidewalks provided expressly for use by the general public.

Thus, the City can point to no split among the lower courts on the issue presented in this case. Indeed, the Ninth Circuit is the only appellate court to have considered this issue.

II. THE DECISION BELOW IS CONSISTENT WITH THE DECISIONS OF THIS COURT

Contrary to the City's assertions, the Ninth Circuit's decision fully comports with the decisions of this Court. Indeed, this Court's decisions have repeatedly noted the comprehensive nature of the statutes at issue in this case.

Specifically, the decision below conforms to the standards set forth in *Pennsylvania Dep't of Corrections v. Yeskey*, 524 U.S. 206 (1998). *Yeskey* held that the programs,

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[5] Unlike the ADA, the Rehab Act is not split into separate chapters. Under the Rehab Act, therefore, employment is encompassed by the statutory provision prohibiting discrimination by covered entities. *See, e.g., Consolidated Rail Corp. v. Darrone*, 465 U.S. 621, 632 (1984).

services and activities offered by prisons are covered in the same manner as those offered by other public entities. *Id.* at 210. In so holding, this Court stated that "[m]odern prisons provide inmates with many recreational 'activities,' medical 'services,' and educational and vocational 'programs,' all of which at least theoretically benefit the prisoners (and any of which disabled prisoners could be 'excluded from participation in')." *Yeskey*, 524 U.S. at 210. This Court in *Yeskey* specifically noted that facilities provided by a prison for the use and benefit of the prisoners are clearly covered by the "program, service or activity" language. Thus, this Court observed that "[t]he prison law library, for example, is a service (and the use of it an activity)," both covered by Title II. *Id.* at 211.

The City argued below that public sidewalks are not covered by the program access requirements of the ADA or Rehab Act because they are not specifically mentioned in the statute or regulations. The same argument was made and rejected in *Yeskey*. As this Court noted, "the fact that a statute can be 'applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth.'" *Yeskey*, 524 U.S. at 212 (citing *Sedima S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 499 (1983)); *see also Gorman v. Bartch*, 152 F.3d 907, 912 (8th Cir. 1998) (citing *Yeskey*, 524 U.S. at 212) (noting in a case applying Title II to arrests that "[i]n applying Title II of the ADA to state prisons and prison services, Justice Scalia emphasized the broad language used by Congress and its choice not to include exceptions.").

Undeniably, one uses and benefits from the public sidewalk system, just as one uses and benefits from a library. In providing this clear guidance on the scope and intent of the ADA, and the multitude of situations to

which it could be applied, this Court could not have intended to establish more rights for prisoners than for disabled citizens simply trying to use their local public sidewalks.

In addition, this Court has specifically noted that the ADA was intended to counteract the segregation and isolation historically experienced by people with disabilities. In *Olmstead v. L.C.*, 527 U.S. 581, 588 (1999), this Court specifically noted that:

> Congress determined that . . .
>
> "individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, . . . failure to make modifications to existing facilities and practices, . . . [and] segregation. . . . "

527 U.S. at 588 (quoting 42 U.S.C. §§12101(5)) (noting that the ADA is the Federal government's most "recent and extensive endeavor to address discrimination against persons with disabilities."). "The statute as a whole," this Court noted, "is intended 'to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.'" *Id.* at 589 (quoting 42 U.S.C. §12101(b)(1)); *see also PGA Tour Inc. v. Martin*, 532 U.S. 661 (2001) (noting in a decision involving Title III of the ADA that one of the Act's "most impressive strengths" has been identified as its "comprehensive character") (citation omitted).

Absent the ability of people with disabilities to travel along the sidewalk, the intent of the ADA, as identified by this Court, will be forever unfulfilled. Indeed, the legislative history reaffirmed this, noting that, "[t]he employment, transportation, and public accommodation sections

[of the ADA] would be meaningless if people who use wheelchairs were not afforded the opportunity to travel on and between the streets." H.Rep 485(II), 101st Cong. 2d Sess. 84 (1990), U.S. Code Cong. & Admin. News 1990, 267, 303, 367.

Thus, the "sweeping purpose" of the ADA that this Court has long recognized will indeed be hindered should people with disabilities continue to be excluded from public sidewalks. The Ninth Circuit's decision, both in its reasoning and holding, executes the intent of the ADA as it has been identified by this Court.

III. THE DECISION BELOW IS CONSISTENT WITH THE DECISIONS OF THE OTHER CIRCUIT COURTS

Multiple lower courts have consistently utilized the natural and ordinary meanings of the words of the ADA and Rehab Act, and the implementing regulations, to evaluate the scope of these statutes. It is from the leading cases' use of the ordinary meanings that the Ninth Circuit's decision is derived.

The Third Circuit in *Yeskey v. Commonwealth of Pennsylvania Dep't of Corrections* held that Title II of the ADA applies to prisons. 118 F.3d 168, 170 (3d Cir. 1997), *aff'd, Pennsylvania Dep't of Corrections v. Yeskey,* 524 U.S. 206 (1998). In doing so, it examined the plain language of the statute. As an initial matter, it noted that "activity" means, *inter alia*, "natural or normal function or operation," and includes the "duties or function" of an "organizational unit for performing a specific function." *Id.* at 170 (quoting *Webster's Third New International Dictionary* 22 (1986)). In addition, the *Yeskey* circuit court noted that the

broad regulatory language enacted to implement Title II is intended to "appl[y] to anything a public entity does." *Id.* at 171 (quoting 28 C.F.R. p. 35, app. A, subpt. A) (internal quotation marks omitted). Based upon this broad language, the court concluded that the ADA and Rehab Act "apply to state and locally-operated correctional facilities." *Id.* at 172.

In *Innovative Health Systems, Inc v. City of White Plains,* the Second Circuit replicated this approach to determine that zoning is encompassed by the scope of Title II. 117 F.3d 37 (2d Cir. 1997), *superceded on other grounds, Zervox v. Verizon New York, Inc.*, 252 F.3d 163, 171 n.7 (2d Cir. 2001). The Second Circuit relied similarly on the dictionary definition of "activity" to determine that Title II covers the "natural or normal function[s] or operation[s]." *Innovative Health*, 117 F.3d at 44 (quoting *Webster's Third New International Dictionary* (1993)). The Second Circuit also looked to the definition contained in the Rehab Act of "all of the operations" of a public entity. *Innovative Health*, 117 F.3d at 44. Finally, as with the *Yeskey* court, the *Innovative Health* court also relied upon regulatory guidance to determine that Title II applies "anything a public entity does." *Id.* (quoting 28 C.F.R. pt. 35, app. A at 456). Thus, using the "plain meaning" of the statute, the court concluded that zoning was encompassed by Title II. *See id.* at 46.

The Ninth Circuit followed this approach to statutory interpretation in *Bay Area Addiction Research & Treatment, Inc. v. City of Antioch*, 179 F.3d 725 (9th Cir. 1999) ("BAART"). In *BAART*, the Ninth Circuit followed the lead of the Second and Third Circuits and began with the ADA's text. *Id.* at 730. In doing so, the Ninth Circuit utilized the *Innovative Health* and *Yeskey* courts' determination that

Title II covered "normal function[s] of a governmental entity." *Id.* at 731.

The Ninth Circuit in *BAART* also looked at the definition contained in the Rehab Act itself, observing that the Rehab Act defines "program or activity" to mean "all of the operations of a qualifying local government." *BAART*, 179 F.3d at 731 (citing 29 U.S.C. §794(b)(1)(A)). Noting that Congress instructed that the ADA is to be interpreted consistently with the Rehabilitation Act, the *BAART* court interpreted Title II's coverage in light of that definition. *BAART*, 179 F.3d at 731. Consequently, the Ninth Circuit, like the Second Circuit, concluded that zoning was regulated by the ADA.

This general approach to interpretation of Title II of the ADA and the Rehab Act has been adopted in other Circuits. *See, e.g., Oconomowoc Residential Programs, Inc. v. City of Milwaukee*, 300 F.3d 775, 782 (7th Cir. 2002) ("Although the ADA does not explicitly define 'services, programs, or activities,' the regulations promulgated pursuant to the act state that 'title II applies to anything a public entity does.'"); and *Johnson v. City of Saline*, 151 F.3d 564, 569-70 (6th Cir. 1998) (holding that Title II applies to virtually everything a public entity does).

A variety of other cases are remarkably uniform in their decisions reaffirming the comprehensive nature of Title II. These cases have consistently applied Title II to anything a public entity does or provides, vis-a-vis the public. *See, e.g., Washington v. Indiana High School Athletic Ass'n*, 181 F.3d 840, 846-847 (7th Cir. 1999) (state high school athletic association's eight-semester eligibility rule); *Frederick L. v. Dept. of Public Welfare*, 157 F.Supp.2d 509, 538-539 (E.D. Pa. 2001) (state's failure to transfer

people with mental disabilities from state mental hospital to integrated community settings); *Access Living of Metropolitan Chicago v. Chicago Transit Authority*, 20 NDLR P 211 (N.D. Ill. 2001) (public transportation bus and train services); *Henrietta D. v. Giuliani*, 119 F.Supp.2d 181, 206 (E.D.N.Y. 2000), *appeal dismissed*, 246 F.3d 176 (city agency's distribution of federal and state public assistance benefits and services); *People of New York ex rel Spitzer v. County of Delaware*, 82 F.Supp.2d 12, 17 (N.D.N.Y 2000) (polling places); *Santiago v. Garcia*, 70 F.Supp.2d 84, 89-90 (D. Puerto Rico 1999) (territorial civil trial); *Galusha v. New York State Dept. of Environmental Conservation*, 27 F.Supp.2d 117 (N.D.N.Y. 1998) (state park agency's policy of limiting access to parks in areas); *Doe v. Stincer*, 990 F.Supp. 1427, 1430 (S.D. Fla. 1997) *vacated on grounds of organizational standing and remanded, Doe v. Stincer*, 175 F.3d 879 (11th Cir. 1999) (statutory access to medical records); *Marisol A. by Forbes v. Giuliani*, 929 F.Supp. 662, 685 (S.D.N.Y. 1996) (city's child welfare agency); *Heather K. by Anita K. v. City of Mallard*, 946 F.Supp. 1373, 1387 (N.D. Iowa 1996) (regulation of leaf burning); *Concerned Parents to Save Dreher Park Ctr. v. City of West Palm Beach*, 846 F.Supp. 986, 992 (S.D. Fla. 1994) (city's recreational program); *Civic Ass'n of Deaf of New York City, Inc. v. Giuliani*, 915 F.Supp. 622, 634-635 (S.D.N.Y. 1994) (provision of city's street alarm box system).

The Ninth Circuit's decision in this case relied heavily upon this line of cases. Pet.App. A at 3a (citing *Innovative Health Systems, Inc v. City of White Plains*, 117 F.3d 37, 45 (2d Cir. 1997), *Johnson v. City of Saline*, 151 F.3d 564, 569 (6th Cir. 1998); and *Yeskey v. Pennsylvania Dep't of Corrections*, 118 F.3d 168, 171 (3d Cir. 1997)). The City argues

that in relying upon the standards outlined above the Ninth Circuit disregarded the language of the statute, deciding that it is not necessary to determine whether something is a "program, service or activity." As the above analysis demonstrates, however, the "program, service, or activity" text of the statute itself formed the very foundation of the Ninth Circuit's decision.

In light of the language of the statute, as well as interpreting regulations and case law, the Ninth Circuit in this case determined that the system of public sidewalks squarely fits within the scope of Title II. Pet.App. A at 2a. Sidewalks are provided by the City to the public as a means for traveling safely around the City. They are furnished by the City for use by the general public. The Ninth Circuit logically found that in light of the language of the statute and regulations this is precisely the type of situation that the ADA and Rehab Act were intended to address.

IV. NO OTHER REASON JUSTIFIES THE GRANTING OF A WRIT OF CERTIORARI

Unable to point to relevant conflict among the courts, the City obfuscates the issue and uses hyperbole in an attempt to create a justification for the granting of a writ of certiorari. The City argues that "the cost of complying with the Ninth Circuit's ruling will be enormous." This argument ignores the undue burden defense, and raises issues not even addressed by the trial court.

As an initial matter, the City misstates the question presented. The question that was decided below was whether the program access requirement of Title II of the Americans with Disabilities Act, 42 U.S.C. §12132, and

Section 504 of the Rehabilitation Act, 29 U.S.C. §794, applies to sidewalks. The City now attempts to expand the issue presented beyond that at issue below, and far beyond the record in this case, by including within its petition the issue of whether unidentified "other forms of physical infrastructure owned by state or municipal governments" constitute programs, services or activities under these statutes. The City uses this expansion in order to exaggerate the impact of this decision, citing to millions of miles of roads that the City argues would need to be retrofitted. However, roads and other types of public "infrastructure" have never been at issue in this case.

In reality, the question presented to and decided by the court below was much more straightforward. Is a system of public sidewalks, provided to the public for use by the public, a program, service, or activity, under these statutes? The Ninth Circuit found, based on the language and intent of the statute, as well as implementing regulations and case law, that the answer is yes.

In contrast to the City's representations, moreover, the program access standard is distinctly limited. Under this standard "[a] flexible concept of accessibility is employed. . . . " *Kinney v. Yerusalem*, 9 F.3d 1067, 1071 (3d Cir. 1993). Specifically, the implementing regulations for Title II state that a public entity is not required "to take any action that it can demonstrate would result in a fundamental alteration in the nature of a service, program, or activity or in undue financial and administrative burdens." 28 C.F.R. §35.150(a)(3).

The Ninth Circuit specifically noted in its decision that the City will have the opportunity to present evidence regarding the undue burden defense. Specifically, the court

stated that "[a]t trial, the City will have the opportunity to present evidence concerning any 'undue financial and administrative burdens,' pursuant to §35.150(a)(3). . . . " Pet.App. A at 8a n.6.

Because this is an interlocutory appeal, the district court has not even been presented with an opportunity to address the issue of what exactly the City must do to provide program access along the public sidewalk system. On remand, the court below will have ample opportunity to address the financial and administrative impact of any action required to provide access to the City's sidewalks. The parties will present evidence to demonstrate what the City can and cannot reasonably do in order to remedy the barriers at issue. *See, e.g.*, *Onishea v. Hopper*, 171 F.3d 1289 (11th Cir. 1999) (evaluating impact on budget of requested accommodations). In a similar, yet distinct context this Court has already set forth guidance regarding the type of balancing inherent in the ADA's standards. *See Olmstead v. L.C.*, 527 U.S. 581, 605 (1999) (explaining that the state would not be required to shut all institutions, but rather could create an "effectively working plan" that "moved at a reasonable pace," to place people in less restrictive settings). The trial court might conclude, for example, after examining the evidence presented, that the City can reasonably allocate a certain amount of funds each year for addressing sidewalk barriers, in the same fashion as the City has already agreed to do for addressing curb cuts. Such a ruling would enable the City to spread the barrier removal work over a period of decades, thus preventing the undue burden on the City's overall resources.

CONCLUSION

For the foregoing reasons, Respondents oppose the petition for a writ of certiorari.

Respectfully Submitted,

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